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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. **674**

65

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

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Subject Index

| | Page |
|--|------|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Summary of argument | 5 |
| Argument | 6 |
| I. Congress did not intend by reason of FECA Section 757(b) to make a third person unfortunate enough to injure a beneficiary of the FECA the gratuitous statutory indemnitor of the beneficiary's wrongdoing employer | 6 |
| 1. The words of the statute do not preclude the Government's liability to third persons after paying compensation to the employee | 6 |
| 2. Legislative history of Section 757(b) reveals the absence of an intent by Congress to alter existing rights of third parties | 9 |
| II. Congressional policy expressed in the Public Vessels Act is violated by denying petitioner's right to include the Ostrom settlement in the collision damages to be divided | 12 |
| III. Previous decisions of this court have held that "exclusive liability" provisions of federal compensation legislation do not bar recovery by a third party against a negligent employer | 15 |
| IV. The first exception to the ancient admiralty rule of divided damages following a both-to-blame collision should not be created by indirection | 18 |
| V. Decisions of this court interpreting the Harter Act support inclusion of the Ostrom settlement in the damages to be divided between the Government and petitioner | 22 |
| Conclusion | 23 |

Table of Authorities Cited

| Cases | Pages |
|--|---------------|
| Baugh v. Rogers (1944) 24 Cal. 2d 200, 142 P. 2d 785..... | 16 |
| Canadian Aviator Limited v. United States of America (1945) 324 U.S. 215 | 12 |
| Christie v. Powder Power Tool Corp. (D.C. 1954) 124 F. Supp. 693 | 21 |
| Crumady v. The Joachim Hendrick Fisser (1959) 358 U.S. 423 | 6, 15, 16 |
| Drake v. Treadwell Construction Co. (1962) 299 F. 2d 789 | 14 |
| F. W. Fitch Company v. U. S. (1945) 323 U.S. 582..... | 7, 8 |
| Gooch v. U. S. (1936) 297 U.S. 124..... | 7 |
| Haleyon Line v. Haenn Ship Ceiling and Refitting Corpora- tion (1952) 342 U.S. 282 | 17, 18 |
| Hampton Road Industrial Electronics Corporation v. U. S. (1959) 178 F. Supp. 474 | 7 |
| In Re Bush Terminal Company (2nd Cir. 1938) 93 F. 2d 659 | 7 |
| Johansen v. U. S. (1951) 343 U.S. 427 | 9 |
| Lunderberg v. Bierman (Minn. 1954) 63 N.W. 2d 355..... | 16 |
| Moroni v. Instrusion-Prepakt, Inc. (Ill. 1960) 165 N.E. 2d 346 | 16 |
| Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation (1956) 350 U.S. 124 | 6, 15, 16, 17 |
| Schweigmann Bros. v. Calvert Distillers Corp. (1951) 341 U.S. 384 | 6 |
| S.F. Unified School District v. Cal. Building (1958) 162 Cal. App. 2d 434, 328 P. 2d 785 | 16 |
| Smithers and Company, Inc. v. Coles (D.C. Cir. 1957) 242 F. 2d 220, cert. den. 354 U.S. 914 | 20, 21 |
| The Chattahoochee (1899) 173 U.S. 540 | 22 |
| The North Star (1882) 106 U.S. 17..... | 18 |
| The Schooner Catherine (1854) 17 How. 170..... | 18 |
| The Sucarseco (1934) 294 U.S. 394..... | 22 |
| The Thekla (1924) 266 U.S. 328..... | 13 |

TABLE OF AUTHORITIES CITED

iii

| | Pages |
|--|-----------|
| The Toloma (2d Cir. 1934) 72 F. 2d 690..... | 22 |
| The Western Maid (1922) 257 U.S. 419..... | 13 |
| U. S. v. American Trucking Association (1940) 310 U.S. 435 | 6 |
| U. S. v. Atlantic Mutual Ins. Co. (1952) 343 U.S. 236..... | 22 |
| United States v. Shaw (1940) 309 U.S. 495..... | 12, 19 |
| Westchester Lighting Company v. Westchester County Small Estates Corp. (1938) 278 N.Y. 175, 15 N.E. 2d 567..... | 16 |
| Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc. (1958) 355 U.S. 563..... | 6, 15, 16 |
| Witt v. Jackson (1961) 17 Cal. Repr. 369 | 16 |

Statutes

| | |
|---|---|
| Carriage of Goods by Sea Act, 46 USC 1304(2) (a), Section 4(2) | 22 |
| Federal Employees' Compensation Act, 5 USC: | |
| Section 751, et seq. | 2, 3 |
| Section 757(b) | 6, 7, 9, 10, 11, 13, 14, 15, 17, 18, 20, 21 |
| Harter Act, 46 USC 190 et seq. | 22 |
| Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905 et seq., Section 5 | 5, 8, 15, 20 |
| Public Vessels Act of 1925, 46 USC 790 et seq..... | 5, 12 |
| 28 USC 1254(1) | 2 |
| 28 USC 2101(f) | 5 |

Texts

| | |
|--|----|
| Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (Unpublished Tentative Ed. in Harvard Law School Library (1958), p. 529)..... | 8 |
| 2 Larson, The Law of Workmen's Compensation, Section 76.30, p. 235 | 7 |
| Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Cal. L. Rev. (1957): | |
| Page 304 | 18 |
| Page 334 | 20 |

| | Pages |
|---------------------------|-------|
| 95 Cong. Rec. 8761 | 10 |
| 95 Cong. Rec. 14059 | 11 |

Miscellaneous

| | |
|---|-----------|
| H.R. 3191, 81st Cong., 1st Session | 9 |
| S. 1287, 81st Cong., 1st Session | 9, 10, 11 |
| S. 2313, 87th Cong., 2nd Session | 21 |
| Report No. 836, 81st Congress, 1st Session. Report to Accompany H.R. 3191 | 11 |
| Report No. 1603, 87th Congress, 2d Session, Report to Accompany S. 2313 | 21 |
| U.S. Code Cong. Service, 81st Congress, 1st Session, 1949: | |
| Vol. 2, pp. 2125-2143 | 9 |
| Vol. 2, p. 2136 | 12 |

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No. 674

WEYERHAEUSER STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

This case comes before the Court on writ of certiorari issued to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division is re-

ported at 174 F. Supp. 663 (1959) and supplemented at 178 F. Supp. 496 (1959). The opinion of the United States Court of Appeals for the Ninth Circuit (R. 148-160) is reported at 294 F. 2d 179 (1961).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 30, 1961. A timely petition for rehearing, filed on September 29, 1961, was denied on October 24, 1961. The petition for a writ of certiorari was filed on January 19, 1962 and granted on March 5, 1962. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Is the historic and established admiralty rule of divided damages in mutual fault collisions to be altered for the first time by a federal compensation statute?

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 751, *et seq.*, provides in pertinent part (as it appears in the United States Code):

5 U.S.C. 751(a)—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or

death is caused by willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

5 U.S.C. 757(b)—The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

On September 8, 1955, the Liberty Ship SS F. E. WEYERHAEUSER, owned by petitioner, and the Army Dredge PACIFIC, owned by the Corp of Engineers of the United States Army, collided. (R. 5, 6) After the filing of cross-litigations (R. 3, 16) in the United States District Court for the Northern District of California, the District Court found both vessels were to blame and according to the settled admiralty doctrine, ordered that each vessel was entitled to recover from the other one-half of all provable damages and court costs. (R. 71-78)

As a result of this collision Reynold E. Ostrom, a civil service employee of the United States employed on board the PACIFIC sustained personal injuries. (R. 72) Ostrom was an "employee of the United States" within the coverage of the Federal Employees' Compensation Act, 5 USC 751, *et seq.* (R. 72) He received \$329.01 as statutory compensation for his injury (R. 72) and then filed a separate action against petitioner in a Washington state court to recover general damages for his injuries. That suit was removed to the United States District Court for the Western District of Washington. (R. 73) Petitioner's motion to implead the United States in that action under the provisions of Rule 14 of the Federal Rules of Civil Procedure was denied for lack of jurisdiction. (R. 105-107) This action was subsequently settled by petitioner by the payment of \$16,000 to Ostrom, which amount was stipulated to be reasonable by the United States. (R. 68) Ostrom then reimbursed the United States the full compensation payment of \$329.01.

The \$16,000 paid by petitioner to Ostrom was specifically held by the district court, with the government protesting, to be a proper item of the damages to be divided pursuant to the accepted admiralty formula. (R. 74) The Government protested the inclusion of the item in a Motion for Rehearing, which was limited to that matter. (R. 79) After denial of rehearing (R. 92), the United States sought review in the Court of Appeals for the Ninth Circuit. On August 30, 1961 the Court of Appeals reversed and remanded the case to the District Court with directions to recompute damages without allowance for the \$16,000 paid by petitioner to Ostrom. (R. 160) A

timely Petition for Rehearing was filed by petitioner on September 29, 1961 and denied on October 24, 1961 by the Court of Appeals. (R. 161) Petitioner thereupon applied pursuant to 28 USC 2101(f) for stay of mandate upon the decision in order to seek review of the matter by this Court. On December 26, 1961 the Court of Appeals for the Ninth Circuit ordered mandate stayed pending the disposition of a Petition for Certiorari. Certiorari was granted by this Court on March 5, 1962. (R. 161)

SUMMARY OF ARGUMENT

Congress has expressed its clear intent that the Government be liable for its maritime torts as a private shipowner, Public Vessels Act of 1925, 46 USC 790 *et seq.*, and it is conceded that the settlement paid by Petitioner to Ostrom would under the accepted divided damages rule be an element of damages to be shared by both vessels.

The Government seeks to create an exception to the moiety rule by reason of the so-called "exclusive liability" section of a workmen's compensation statute—legislation which purports to deal only with the relationship of employer and the employee together with his immediate relatives and whose legislative history reveals not a shred of evidence that Congress intended to abrogate existing third party rights.

Decisions of this Court interpreting the nearly identical "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905, have found that third party rights remain unaffected. *Ryan*

Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation (1956) 350 US 124; *Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc.* (1958) 355 US 563; *Crumady v. The Joachim Hendrick Fisser* (1959) 358 US 423. The fact that this Court found a contractual relationship between the parties in *Ryan* and the cases following it should in no way alter the result here where disallowance of inclusion of the Ostrom settlement would subject the American merchant fleet to potentially enormous liability without recourse to recover from an equally negligent Government vessel.

ARGUMENT

I. CONGRESS DID NOT INTEND BY REASON OF FECA SECTION 757(b) TO MAKE A THIRD PERSON UNFORTUNATE ENOUGH TO INJURE A BENEFICIARY OF THE FECA THE GRATUITOUS STATUTORY INDEMNITOR OF THE BENEFICIARY'S WRONGDOING EMPLOYER.

1. The words of the statute do not preclude the Government's liability to third persons after paying compensation to the employee.

The language of the statute itself is the foremost guide to legislative intention, *U. S. v. American Trucking Association* (1940) 310 U.S. 534, 543, n. 18; *Schweigmann Bros. v. Calvert Distillers Corp.* (1951) 341 U.S. 384, 390-395. The Court of Appeals for the Ninth Circuit assumes in its opinion¹ that Section 757(b) was intended by Congress to affect the Government's relations to third parties. Applying accepted rules of statutory construction, that assumption is unwarranted.

¹"To allow a third party recovery against the United States on any ground is subversive of the statute limiting the liability of the United States." 294 F. 2d at 181.

Section 757(b) provides that the statutory compensation remedy shall be exclusive with respect to the liability of the employer "to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States" The specific categories enumerated by the statute are thus the employee, his relatives and his dependents. Respondent seeks to apply the general words "anyone otherwise entitled to recover damages" to a person (such as a private shipowner) seeking to recover after a both-to-blame collision—a matter clearly unconnected with the employer's relationship with his workers and their families. Under customary rules of statutory construction the general term "anyone otherwise entitled to recover damages" cannot be given a content totally unrelated to the classes especially mentioned by the statute.² Ordinarily "general terms which follow a specific one [are limited] to matters similar to those specified." *Gooch v. U.S.* (1936) 297 U.S. 124, 128; *F. W. Filch Company v. U. S.* (1945) 323 U.S. 582, 586; *In Re Bush Terminal Company* (2nd Cir. 1938) 93 F. 2d 659, 660; *Hampton Road Industrial Electronics Corporation v. U. S.* (1959) 178 F. Supp. 474, 477.

By the use of the word "direct" in modifying "judicial proceedings" in Section 757(b), it is clear that Congress intended the section to operate as a shield for the employer only in regard to damage actions instituted by the class of persons enumerated by the statute. Unless the phrase "direct judicial proceedings" is interpreted to

² Larson, *The Law of Workmen's Compensation*, Section 76.30, p. 235.

apply to actions initiated by the employee, his dependents or relatives, "direct" would be meaningless.

As stated in the *F. W. Fitch Company v. U. S.* opinion *supra*, the *eiusdem generis* rule should not be applied where it defeats the obvious purpose of the legislation. It clearly would not in the instant action. The FECA deals with the relationship of employer with his employees. The scheme of this statute—as is true with workmen's compensation statutes in general—is to provide a guaranteed compensation to the injured employee from his employer regardless of the fault of the employee. The *quid pro quo* to the employer is limited liability. The third party—the shipowner—has received nothing and should not be held to have given up the right in this instance to receive one-half of all his provable damages—his right absent the statute.³

³Professors Hart and Sacks of the Harvard Law School have written the following with regard to the argument that Section 5 of the Longshoremen's and Harbor Workers' Act precludes all third party recovery, the argument of the Government herein with regard to the nearly identical section of the FECA:

"The national legislature, we are asked to suppose, made a deliberate decision that the third person—when there was one—should be left holding the bag for both employer and employee. In pursuance of a congressional purpose to sweeten up the *quid pro quo* even for negligent employers, the third person was to be deprived of the right to contribution which the principals of the pre-existing general law kindly gave him, with no *quid* in return for his *quo* whatever and this wish to be accomplished *inter alia*, by presenting the legal world with the theretofore unheard of spectacle of the negligent plaintiff recovering from his co-tortfeasor not merely half his damages—but the whole of them—on the excuse that a surplus might be produced which would benefit the plaintiff's employee." Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Unpublished Tentative Ed. in Harvard Law School Library (1958), p. 529).

2. Legislative history of Section 757(b) reveals the absence of an intent by Congress to alter existing rights of third parties.

This Court has previously considered the 1949 amendments to the FECA, among which is Section 757(b). *Johansen v. U. S.* (1954) 345 US 427, 438. The decision in *Johansen* was that Congress in Section 757(b) intended to work no alteration in existing remedies of seamen because the seaman had not had an opportunity to be heard during Congressional consideration of the amendments. Senator Douglas, the committee's spokesman for the bill on the floor of the Senate, was quoted to the same effect. As a result this Court held that the intent of Congress was to leave the law respecting seamen's remedies as it existed prior to the passage of the 1949 amendments.⁴ Similarly, petitioner respectfully submits that this Court should find that third party rights arising out of mutual fault collisions were not intended to be affected by these amendments. Petitioner has searched the committee hearings and congressional debates without finding a shred of evidence indicating Congressional interest or intent in a literal interpretation of the phrase "the liability of the United States . . . shall be exclusive." Every indication is that the House and Senate committees and Congress itself intended to affect only the rights of employers vis-a-vis employees.⁵

⁴"If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now." 343 U.S. at 438.

⁵The 1949 amendments to the FECA were embodied in S. 1287 and H.R. 3191, both considered by the 81st Congress, 1st Session. Hearings were held before the Special Subcommittee of the Committee on Education and Labor of the House of Representatives at Washington on April 11, 12, 13 and May 2, 1949. The Committee reports on the companion bills are reprinted in U.S. Code Cong. Service, 81st Congress, 1st Session, 1949, Vol. 2, pp. 2125-2143.

The bill originally drafted and considered by the subcommittee of the House Education and Labor Committee contained the following Section 757(b):

(b) The remedy afforded to any person under the act with respect to his own injury or the death of another individual shall, unless otherwise specifically provided by law, be the exclusive remedy against and be in place of any other legal liability of the United States or any of its instrumentalities wholly owned by it, on account of such injury or death, where such liability is determinable by direct judicial proceedings at law, in admiralty, or by proceedings under any workmen's compensation law or under any other federal tort liability statute, 95 Cong. Rec. 8759.

The committee recommended to the House that the phrase "unless otherwise specifically provided by law" be stricken. 95 Cong. Rec. 8761. The only reasonable interpretation of this revision, which was accepted by the House on passage of the bill, is that the committee considered the "exclusivity" provision too broad and did not wish the burden of establishing the survival of existing rights and remedies to be on the party asserting them.

The proposed amendments to the FECA in the form adopted by the House reached the Senate for consideration as S. 1287. The Senate Committee on Labor and Public Welfare reported the bill favorably with the following revision to Section 757 (b), which was accepted by the Senate and subsequently adopted by the House:

(b) The liability to the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other

liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any federal tort liability statute.

In summary, the original House draft of this section limited its application only by the phrase "to any person." The revision by the Senate defined and limited the class of persons to whom the section was to apply to the employee and his beneficiaries. The Senate committee revision was accepted by the Senate and concurred in by the House on October 6, 1949, 95 Cong. Rec. 14059.^{*} The Senate Report on the measure as enacted (Report No. 836, 81st Congress, 1st Session, Report to Accompany HR 3191) discusses the technical amendments, including Section 757(b), in a manner that confirms that the only intent of Congress was to affect the relationship between employer and employee together with the employee's beneficiaries. Although the report states that "needless and expensive litigation will be replaced with measured justice" (at page 23), no hint is given that the rights of third parties were intended to be changed by this section. The report states:

Since the proposed remedy would afford *employees and their dependents* a planned and substantial pro-

^{*}See Appendix A for text of Senate debate regarding adoption of S. 1287.

tection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the *beneficiaries* involved and the Government. (Emphasis added)⁷

The clear import of this statement is that the Committee felt it was dealing with persons in an employer-employee relationship and no others.

II. CONGRESSIONAL POLICY EXPRESSED IN THE PUBLIC VESSELS ACT IS VIOLATED BY DENYING PETITIONER'S RIGHT TO INCLUDE THE OSTROM SETTLEMENT IN THE COLLISION DAMAGES TO BE DIVIDED.

Congressional policy with regard to the liability of the United States Government for maritime torts was clearly and definitively expressed in Public Vessels Act of 1925, 46 USC 781 *et seq.* The intent of that statute was that the United States be liable *in rem* and *in personam* just as a private shipowner when government ships tortiously cause personal injury or property damage. *Canadian Aviator Limited v. United States of America* (1945) 324 U.S. 215. In *United States v. Shaw* (1940) 309 U.S. 495, this Court affirmed the inapplicability of sovereign immunity as a shield for the United States in both-to-blame collisions.

The language of the opinion below clearly indicates that the Court of Appeals for the Ninth Circuit intended to place the burden on petitioner to show that Congress in

⁷U.S. Code Cong. Service, 81st Congress, 1st Session, 1949, Vol. 2, p. 2136.

Section 757(b) of FECA did *not* intend to alter the clear policy expressed in the Public Vessels Act of 1925. In its opinion, the Court states:

We do not presume that if there never had been a retreat by the United States from its absolute non-liability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. . . . But can a limited waiver of sovereign immunity be enlarged by indirection, i.e. through the negligent act of a third party—the shipowner? We think not.*

Petitioner respectfully submits that this statement of the Court of Appeals ignores both the legislative policy of Congress expressed in the Public Vessels Act of 1925 and the decisions of this Court pre-dating that legislation.

Decisions of this Court established the liability of the United States to share damages after a both-to-blame collision involving a government vessel prior to the passage of the Public Vessels Act of 1925. Mr. Justice Holmes in *The Western Maid* (1922) 257 U.S. 419 in his majority opinion held that the sovereign immunity of the United States prevented any affirmative relief for private vessels so unfortunate as to be in collision with a vessel owned by the United States government. In *The Thelma* (1924) 266 U.S. 328, however, Mr. Justice Holmes for the majority reversed his prior opinion and specifically held the United States subject to affirmative relief in both-to-blame collisions. Subsequent to that decision, Congress passed the Public Vessels Act of 1925, which affirmed that Con-

*294 F. 2d at 182.

gress intended to place the government in the same position as the private shipowner with regard to liability for damages in maritime collisions.

Petitioner respectfully submits that permitting the private shipowner to recover from the Government one-half of the settlement paid to Ostrom would have the effect of affirming congressional policy and the decisions of this Court and is in no way enlarging "by indirection" a limited waiver of sovereign immunity.⁹ The legislative policy of Congress that the government should be liable for maritime torts, just as a private shipowner, should not be abrogated without an equally clear expression of a congressional change of mind. The burden should be placed on the government to show that change of mind. As previously discussed, the words of Section 757(b) of the Federal Employees' Compensation Act purport to deal with the relationship of employer and employee and the legislative history of the amendments of 1949 show absolutely no congressional intent to amend the rights of third parties.¹⁰

⁹294 F. 2d 182.

¹⁰The Court of Appeals for the Third Circuit in *Drake v. Treadwell Construction Co.* (1962) 299 F. 2d 789 has, like the Court below, without examining the legislative history or policy of the statute found Section 757(b) of the FECA to have abolished existing third party rights.

**III. PREVIOUS DECISIONS OF THIS COURT HAVE HELD THAT
"EXCLUSIVE LIABILITY" PROVISIONS OF FEDERAL
COMPENSATION LEGISLATION DO NOT BAR RECOVERY
BY A THIRD PARTY AGAINST A NEGLIGENT EMPLOYER.**

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905 *et seq.*, is nearly identical to Section 757(b) of the Federal Employees' Compensation Act and provides:

The liability of an employer prescribed in Section 4 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . .

In *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation* (1956) 350 US 124, this Court held that where injuries to a longshoreman-employee occurred through some fault of his employer, the third party shipowner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act. This Court affirmed the *Ryan* holding in *Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc.* (1958) 355 US 563, and in *Cramady v. The Joachim Hendrick Fisser* (1959) 358 US 423. These decisions refute the government's position that a literal reading of the "exclusive liability" provision of the FECA is justified. Equally in error is the statement by the Court of Appeals in its decision below, which concluded:

The [Longshoremen's and Harbor Workers' and the Federal Employees' Compensation] Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee.¹¹

The decisions of this Court in *Ryan*,¹² *Nacirema*¹³ and *Crumady*¹⁴ have carefully considered the language of the "exclusive liability" provision of the Longshoremen's and Harbor Workers' Act and found that it must be given a meaning consistent with the policy of the statute and the class of persons defined by the statute as beneficiaries. It is also significant that state courts interpreting comparable "exclusive liability" provisions of state compensation acts have nearly universally held that the rights of third parties are not affected by such provisions.¹⁵

The decisions of this Court in the compensation cases cited emphasized that the third party was granted recovery against the negligent employer because the two were in a contractual relationship. In *Ryan v. Pan-Atlantic Steamship Corporation*, this Court stated that "because respondent in the instant case relies entirely upon peti-

¹¹294 F. 2d at 185.

¹²350 U.S. 124.

¹³355 U.S. 563.

¹⁴358 U.S. 423.

¹⁵Typical of these cases are *Baugh v. Rogers* (1944) 24 Cal. 2d 200, 142 P. 2d 785; *S.F. Unified School District v. Cal. Building* (1958) 162 Cal. App. 2d 434, 328 P. 2d 785; *Witt v. Jackson* (1961) 17 Cal. Repr. 369; *Lunderberg v. Bierman* (Minn. 1954) 63 N.W. 2d 355; *Moroni v. Instrusion-Prepakt, Inc.* (Ill. 1960) 165 N.E. 2d 346; *Westchester Lighting Company v. Westchester County Small Estates Corp.* (1938) 278 N.Y. 175, 15 N.E. 2d 567.

tioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right.¹⁶ There is every indication in the *Ryan* opinion, however, that this Court employed "contract" vocabulary in order to reach an equitable result without expressly overruling *Halcyon Line v. Haenn Ship Coiling and Refitting Corporation* (1952) 342 US 282, in which this Court refused to extend to admiralty the common law rule of contribution between joint tortfeasors.¹⁷ The facts of the instant action present no contractual relationship between the private shipowner and the government. No logical reason either of the policy of the Compensation Act, of the intent of Congress, or of the words of the statute exist, however, for reaching a result in interpreting Section 757(b) in a manner contrary to the decision of the Court in *Ryan* permitting full recovery by the third party from the injured employee's negligent employer. On the contrary, every reason of policy and equity supports permitting petitioner to recover according to the moiety rule. Petitioner has no relation to the employment nexus and has received no benefit under this statute. The liability of the government to Ostrom for compensation under the EFCA amounted to \$329.01, whereas a reasonable settlement of the injuries of this man by common law tests was \$16,000. It is inconceivable that Congress intended that the liability of the government to share the

¹⁶350 U.S. 124, 133.

¹⁷In *Halcyon*, however, the Court limited its decision denying contribution to non-collision situations and expressly stated that contribution was a recognized rule in both-to-blame collisions. 342 U.S. 282, 284.

common law damages be altered by indirection in Section 757(b) and thus subject the private shipowner to potentially huge liability without recourse to recover from the equally negligent government vessel.

IV. THE FIRST EXCEPTION TO THE ANCIENT ADMIRALTY RULE OF DIVIDED DAMAGES FOLLOWING A BOTH-TO-BLAME COLLISION SHOULD NOT BE CREATED BY INDI-RECTION.

The time-honored rule in admiralty is that the vessels in a both-to-blame collision share their damages equally. *The Schooner CATHERINE* (1854) 17 How. 170; *The NORTH STAR* (1882) 106 US 17, 21. This Court recently stated the accepted rule in *Halcyon Line v. Haccu Ship Ceiling and Refitting Corporation* (1952) 342 US 282, 284:

Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases.

See also Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304 (1957).

The moiety rule reflects a policy that in maritime collisions the contributory negligence of one of the parties should not bar him from all recovery. The Court of

Appeals for the Ninth Circuit in its opinion below does not take issue with the fact that the divided damages rule would ordinarily result in a division of the settlement award made to Ostrom.¹⁸ But in denying inclusion of this settlement in the damages to be divided between petitioner's vessel and the government vessel, it concluded:

Thus it must be candidly admitted that while the United States once had a duty to other *shipowners* [emphasis by the Court] to navigate carefully in order not to injure its employees, that duty has been abrogated by the [Federal Employees'] Compensation Act.¹⁹

The Court thus concludes that Congress in the FECA intentionally restricted the divided damages rule in admiralty, whereas the legislative history and wording of the statute clearly and completely fail to support this conclusion.

This Court has recognized the peculiar nature of the rule of division of damages after a both-to-blame collision. In *United States v. Shaw* (1940) 309 US 495, 502, the Court stated:

The *THEKLA* turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided.

¹⁸294 F. 2d at 181.

¹⁹294 F. 2d at 185.

A recent commentator on the moiety rule has described the nature of the liability involved:

Contribution in admiralty is not mere subrogation and, in consequence, the party sued for contribution does not enjoy the advantage of personal defenses he may have had as to the injured party nor even the protection of a statute of limitations which would bar suit if brought by the original libellant [citing cases]. The courts have pointed out that unlike contribution at law, which is an adjustment between tort feors founded upon principles of equity and not of tort liability, contribution in admiralty is a substantive right arising directly from the tort. [citing cases]²⁰

In the opinion below, the Court of Appeals for the Ninth Circuit in creating the first exception to the moiety rule places considerable emphasis on *Smithers and Company, Inc. v. Coles* (D.C. Cir. 1957) 242 F. 2d 220, cert. den. 354 US 914. The Court in that case denied the wife's right to recover for loss of consortium on the grounds that her spouse was given his exclusive remedy for compensation by reason of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act. Petitioner submits that the nature of the liability of a vessel in a mutual fault collision differs fundamentally and historically from a derivative cause of action such as was present in the *Smithers* case. The language of Section 757(b) of the FECA indicates an intention of Congress to provide the sole means of recovery for the employee and his various *beneficiaries*, specifically naming the employee's spouse. For that reason the *Smithers* case in

²⁰Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases", 45 Cal. L. Rev. at 334 (1957).

denying an additional recovery to the spouse is not in conflict with the purpose and intent of Section 757(b).²¹ To the extent that the *Smithers* decision, however, purports to deny *all* third party rights of recovery, petitioner respectfully submits that the decision is not in accord with the policy of the compensation act and should be overruled.

So far as petitioner is able to ascertain, denial by this Court of petitioner's right to recover one-half of its settlement to Ostrom would result in creating the first exception to the moiety rule. Petitioner respectfully submits that such exception, because of the tremendous potential liability that it might place on the American merchant fleet, should not come by way of indirection as it would if Section 757 (b) were held to bring this result, but only after careful congressional deliberation.²²

²¹Similarly, *Christie v. Powder Power Tool Corp.* (D.C. 1954) 124 F. Supp. 693, denying alleged tortfeasors the right to file a third party complaint against the United States when an action for wrongful death was commenced by decedent's administrator is not in point.

²²The Brussels Convention of 1924 unifying rules with respect to maritime collisions supports contribution to personal injury damages by both negligent vessels. A total of 34 nations are presently party to the convention, and the United States Senate in S. 2313 is this year considering ratification of it, following recommendation of S. 2313 by the Merchant Marine Subcommittee of the Senate Committee on Interstate and Foreign Commerce. The United States, acting as the world's largest shipowner, strongly supported the contribution rule in hearings on S. 2313, a position in conflict with the stand taken herein. See Report No. 1603, 87th Congress, 2d Session. Report to Accompany S. 2313.

V. DECISIONS OF THIS COURT INTERPRETING THE HARTER ACT SUPPORT INCLUSION OF THE OSTROM SETTLEMENT IN THE DAMAGES TO BE DIVIDED BETWEEN THE GOVERNMENT AND PETITIONER.

The Harter Act, 46 USC 190 *et seq.*, substantially re-enacted in Section 4(2) of the Carriage of Goods by Sea Act, 46 USC 1304 (2)(a), provides categorically that cargo cannot collect directly from the carrying vessel for damages as a result of faults in navigation.²³ In spite of this language, however, this Court has recognized the special nature of an action to divide damages after a both-to-blame maritime collision and has held that the carrying vessel must share, according to the divided damages rule, damages sustained by the non-carrying vessel attributable to its own cargo. *The CHATTANOOCHEE* (1899) 173 US 540, 551-555; *The SUCARSECO* (1934) 294 US 394.

²³The Harter Act provides in pertinent part:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C. 192.

The Carriage of Goods by Sea Act, Section 4(2), provides:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;" 46 U.S.C. 1304(2)(a).

See also *U. S. v. Atlantic Mutual Ins. Co.* (1952) 343 US 236; *The TOLUJA* (2d Cir. 1934) 72 F. 2d 690, 692.

Petitioner respectfully submits that the principle in issue herein is in accord with the rule that vessels in a both-to-blame collision share cargo damage according to the moiety principle, regardless of the "immunity" for the carrying vessel given by the Harter Act and should be decided accordingly.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed and that entered in the District Court should be reinstated with costs to petitioner being granted.

Dated, San Francisco, California,
August 6, 1962.

Respectfully submitted,

CHALMERS G. GRAHAM,

HENRY R. ROLPH,

Proctors for Petitioner.

GRAHAM JAMES & ROLPH,

DAVID C. PHILLIPS,

Of Counsel.

(Appendix A Follows.)

Appendix A

93 CONGRESSIONAL RECORD (pages 13606-13609)
(September 30, 1949)

COMPENSATION FOR EMPLOYEES INJURED IN THE PERFORMANCE OF THEIR DUTIES

Mr. Lucas. Mr. President, I move that the Senate proceed to consider Calendar No. 243, House bill 3191.

The Presiding Officer. The clerk will state the bill by title.

The Chief Clerk. A bill (H. R. 3191) to amend the act approved September 7, 1916 (ch. 458, 39 Stat. 742), entitled "An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," as amended, by extending coverage to civilian officers of the United States and by making benefits more realistic in terms of present wage rates, and for other purposes.

The Presiding Officer. The question is on agreeing to the motion of the Senator from Illinois.

The motion was agreed to, and the Senate proceeded to consider the bill (H. R. 3191) to amend the act approved September 7, 1916 (ch. 458, 39 Stat. 742), entitled "An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," as amended, by extending coverage to civilian officers of the United States and by making benefits more realistic in terms of present wage rates, and for other purposes, which had been reported from the Committee on Labor and Public Welfare, with amendments.

The Presiding Officer. The clerk will proceed to state the amendments of the committee.

The amendments were, on page 3, line 5, before the word "shall", to strike out "or of any two thereof"; on page 5, line 2, after the word "or", to insert "involves"; in line 8, after "(b)", to insert "and in cases involving disfigurement"; on page 12, line 21, after the word "capacity", to insert a colon and the following proviso: "*Provided*, That for any period of temporary total disability the augmentation of his basic compensation for disability payable under section 3 shall be limited to that part of his monthly pay which is not in excess of \$420"; on page 14, line 12, after the word "for", to strike out "total"; in line 15, after the word "be", to insert "more than \$525 per month and in cases of total disability shall not be"; in line 18, after the word "compensation", to insert "for total disability"; on page 16, line 17, after the numerals "12", to insert "or the sum of \$525"; on page 19, line 5, after "United States", to strike out "but not including Members of Congress"; on page 20, line 25, after the word "occurred", to insert "before May 1, 1943, in the cases of persons employed in the postal service whose compensation was affected by the act of April 9, 1943 (57 Stat. 59), or"; on page 21, line 3, after the numerals "1941", to insert "in all other cases"; in line 6, after the word "in", to strike out "neither" and insert "no"; after line 16, to strike out:

(b) The *remedy* afforded to any person under this act with respect to his own injury or the death of another individual shall be the exclusive remedy against, and be in place of any other legal liability of the United States

or any of its instrumentalities on account of such injury or death; where such liability is determinable by direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute.

And in lieu thereof to insert the following:

(b) The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute.

On page 22, line 15, after "Sec. 202"; to insert "(a)"; on page 23, after line 13, to insert:

(b) Section 9 of the Federal Employees' Compensation Act, as so amended, is further amended by inserting immediately before the last sentence of subsection (a) of such section the following: "The Administrator may under such limitations or conditions as he shall deem necessary, authorize employing establishments of the United States to provide for the initial furnishing of medical and other benefits under this section, and the Administrator may certify for payment out of the Employees' Compensation Fund vouchers for expenses thus incurred

for such benefits, upon certification by the person required by section 24 to make reports of injury that the expense was incurred, in respect to injury which was accepted by the employing establishment as probably compensable under this act. The form and content of such certification shall be prescribed by the Administrator."

On page 32, after line 20, to insert:

ACCIDENT PREVENTION AND ANNUAL REPORTS

SEC. 209. Section 33 of the Federal Employees' Compensation Act, as amended, is further amended by designating the first two paragraphs thereof, respectively, subsections "(a)" and "(b)" and by adding a new subsection designated as "(c)," as follows:

"(c) In order to reduce the number of accidents and injuries among Government officers and employees, encourage safe practices, eliminate work hazards and health risks, and reduce compensable injuries, the heads of the various departments and agencies are authorized and directed to develop, support, and foster organized safety promotion, and the President may also establish by Executive order a safety council composed of representatives of Government departments and agencies to serve as an advisory body to the Administrator in furtherance of the safety program carried out by the Administrator pursuant to this section, and the President may undertake such other measures as he may deem proper to prevent injuries and accidents to persons covered by this act. Departments and other agencies of the United States shall keep such records of injuries and accidents to persons covered by this act, whether or not resulting in loss of time or the payment or furnishing of benefits, and make such statistical or other

9
reports and upon such forms as the Administrator may by regulation prescribe."

And on page 38, after line 22, to strike out:

ACCIDENT PREVENTION AND ANNUAL REPORTS

SEC. 305. Section 33 of the Federal Employees' Compensation Act, as amended, is further amended by designating the first two paragraphs thereof, respectively, subsections "(a)" and "(b)" and by adding a new subsection designated as "(c)," as follows:

"(c) In order to reduce the number of accidents and injuries among Government officers and employees, encourage safe practices, eliminate work hazards and health risks, and reduce compensable injuries, the heads of the various departments and agencies are authorized and directed to develop, support, and foster organized safety promotion, and the President may also establish by Executive order a safety council composed of representatives of Government departments and agencies to serve as an advisory body to the Administrator in furtherance of the safety program carried out by the Administrator pursuant to this section, and the President may undertake such other measures as he may deem proper to prevent injuries and accidents to persons covered by this act."

The amendments were agreed to.

The Presiding Officer. That completes the committee amendments. The bill is open to further amendment.

Mr. Knowland. Mr. President, I wonder if for the Record the junior Senator from Illinois will not make a brief explanation as to the changes.

Mr. Douglas. Mr. President, this bill is to revise the Compensation Act for disabling accidents suffered by Federal employees. The original act was passed in 1916. The last amendment to the bill was adopted in 1927, or nearly a quarter of a century ago. At that time the maximum monthly benefit which could be paid to any Federal employee was fixed at \$116.66, which amounted to \$1,400 a year. The standard scale of benefits was to be 66 $\frac{2}{3}$ percent of earnings. Therefore, the imposition of the \$1,400 a year maximum meant that all earnings in excess of \$2,100 were not protected.

The 1927 scale was relatively adequate for the 1920's because the average salary of a Government employee was then within the \$2,000-\$2,500 scale. Since then, with the increase in the cost of living and the general upward movement of salaries, Federal salaries have also markedly increased, but the ceiling of compensation rates has not. So that today the maximum amount a person can receive in case of injury is still \$1,400 a year, or \$116.66 a month. That means that in the case of the \$4,000 a year man, the protection is not 66 $\frac{2}{3}$ percent of his earnings, but only 35 percent, and in the case of the \$5,000 a year man the protection is slightly less than 30 percent.

We have raised this ceiling very markedly, to \$525 a month. In this connection we have also added, instead of the straight benefit of 66 $\frac{2}{3}$ percent, an additional benefit of 8 $\frac{1}{3}$ percent if the injured worker has a dependent. Therefore, an injured worker with one dependent will receive 75 percent of his pay as accident compensation if and when injured. But we provide that this 8 $\frac{1}{3}$ percent is taken off in the case of all earnings in excess of \$420 a

month, or approximately \$5,000 a year. By imposing the limit of \$5.25 a month, we have insured that no worker will receive more when injured than his net pay, minus income tax, would be if employed and that there will always be an appreciable difference between the two. This is, of course, done to prevent malingering and to give the injured worker an inducement to recover as quickly as possible from temporary disabilities.

In addition to this, in the case of death we have increased the scales for widows and children, raising them by 10 and 5 percent, respectively, but keeping the maximum of 75 percent.

We have revised the schedule for permanent partial disability, to make it conform to the schedule provided in the Longshoremen's Act.

We have increased burial benefits by from \$200 to \$400.

We have provided additional care where a person is totally disabled and needs an attendant. There are other improvements which are outlined in the committee report.

In all we estimate that the added cost will be approximately \$7,000,000 a year, and to this will be added a total of approximately \$7,000,000 more spread over a 10-year period, if we accept, as the committee proposes, the House amendment. This provides that in case of serious disability, such as the loss of an eye, a foot, an arm, or like injury, if the person has been injured since 1941, the benefits will be raised to the scale outlined in the bill.

I understand that the Senator from Oregon [Mr. Morse] has an amendment on coverage to apply to merchant seamen, and at the appropriate time I can say that the com-

mittee is ready to accept his amendment. But I shall first be glad to try to answer any questions which the Senator from California may have to ask.

Mr. Knowland. I thank the Senator for his very clear explanation.

Mr. Douglas. I thank the Senator very much for his courtesy.

Mr. Wherry. Did the Senator say the bill would be retroactive to 1941?

Mr. Douglas. Only in the case of permanent partial disabilities. Those who have suffered such disabilities since 1941 are to be allowed the new scale in the future.

Mr. Wherry. Does the Senator have any idea of what amount of money that would involve?

Mr. Douglas. Seven million dollars, spread over a 6-year period.

Mr. Wherry. Is that what it would amount to retroactively?

Mr. Douglas. That is correct; a total of \$7,000,000, spread over a 6-year period. That is an item of cost added by the House. The ordinary increase will amount to about \$7,000,000 a year.

Mr. Wherry. I am not asking about that.

Mr. Douglas. The retroactive feature is estimated to cost a total of \$7,000,000, distributed over a period of 6 years, or an average of about \$1,200,000 a year. I should now be glad to have the Senator from Oregon present any amendment which he may have in mind.

Mr. Morse. Mr. President, I wish to say first, that I appreciate the Senator's courtesy in calling my office and notifying me that this bill was before the Senate so that

I might come to the Senate Chamber and present my amendment, I offer the amendment and ask that it may be stated. I understand that the Senator from Illinois is willing to accept the amendment.

The Presiding Officer. The clerk will state the amendment of the Senator from Oregon [Mr. Morse].

The LEGISLATIVE CLERK. On page 22, at the end of line 14, it is proposed to insert a colon and the following: "*Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.*"

On page 37, beginning with line 24, strike out all to and including line 6, page 38, and insert in lieu thereof the following:

(g) The amendment made by section 201 of this act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this act: *Provided, however, That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within 6 months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after enactment of this act, whichever is*

later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after final determination of such cause, whichever is later, be entitled to file a claim under such act.

On page 39, between lines 17 and 18, insert the following new section:

SEAMEN

SEC. 305. (a) Nothing contained in this act shall be construed to affect the exclusion of certain seamen (as defined in the act of March 24, 1943, ch. 26, 57 Stat. 45, as amended; 50 U. S. C., Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such act of March 24, 1943, as amended.

“(b) Nothing contained in this act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.

Mr. Morse. Mr. President, I understand the Senator from Illinois is willing to accept the amendment. In effect it continues the seamen in exactly the same legal position which they presently enjoy.

This matter was fought out in 1941, when an attempt was made to bring the seamen under the act, and it was defeated at that time. This amendment continues the historical legal pattern, as far as the seamen are con-

cerned, in respect to workmen's compensation rights. All my amendment does, in effect, is to leave the seamen exactly in the position in which they now are in respect to their legal rights to compensation, giving them, under admiralty law, the right to sue for their compensation.

The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from Oregon.

Mr. Magnuson. Mr. President, I want to associate myself with the amendment offered by the Senator from Oregon. This is a matter which has been before the Merchant Marine and Fisheries Subcommittee. We had previously submitted a similar amendment of the same tenor, and I understand from the Senator from Oregon that his amendment is in similar language. I have had several discussions with the junior Senator from Illinois about the matter, and I think it is a proper amendment. What it does, of course, as the Senator from Oregon has said, is to leave the seamen in their tort right of compensation just as they are now without placing them under the act. I think that is fair and equitable, and the matter should be left in that way. As I said, I want to take this opportunity to thank the Senator from Oregon, and to associate myself with the amendment he has offered.

The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from Oregon [Mr. Morse].

The amendment was agreed to.

Mr. Morse. Mr. President, I ask unanimous consent to have printed at this point in the Record the explanation of my amendment just agreed to, as I intend the purpose

of my amendment to be. The Senator from Illinois [Mr. DOUGLAS] wishes to obtain unanimous consent to have printed without prejudice at this point in the RECORD also, immediately following my explanation, his interpretation of the amendment:

The Presiding Officer. Without objection, the two statements will be printed in the RECORD.

The statements are as follows:

STATEMENT BY SENATOR MORSE

The amendments being offered to H. R. 3191, the bill amending the Federal Employees' Compensation Act, are concerned with two subjects: (1) the status of seamen under the Compensation Act, and (2) the status of pending suits against the Government by Federal employees, brought under the Federal Tort Claims Act and other statutes:

The bill, as passed by the House and reported with amendments, by the Senate Committee on Labor and Public Welfare, provides that as to all Federal employees the Compensation Act benefits shall be exclusive and in place of any other liability of the United States or its instrumentalities. Thus, by section 201 of the bill, a new subsection is added to section 7 of the Compensation Act, reading as follows:

“(b) The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin,

and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute."

In the report of the Senate committee, this provision is explained as follows:

"Sec. 201. Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b).' The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

"Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute

for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act, and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause Federal employees to seek relief under these general statutes. Similarly corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employments.

"This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the Government."

Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and Public Vessels Act, and, moreover, have been permitted an election to accept the benefits of the compensation in lieu of their maritime rights. The benefits to seamen under maritime law, which would be wiped

out prospectively and to some extent retroactively by section 201 of the bill, are regarded as valuable rights by federally employed seamen, whose numbers exceed 46,000 at the present time. The representatives of maritime unions are now strongly urging, since the bill was placed on the Senate Calendar, that their right to sue the United States under maritime law be preserved and that they be kept in status quo. It would appear that none of the seamen's representatives were apprised of the implications of the bill insofar as it affects their maritime rights. Consequently none of the representatives of maritime labor appeared before the committees which considered the bill, and upon a perusal of the hearings I find no evidence that the effect of the bill upon seamen was explored on the merits. I think this is particularly unfortunate, although undoubtedly inadvertent, in view of the fact that seamen for years have opposed exclusive coverage under workmen's compensation.

Because I think there is merit in their position, and because I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress, I am proposing these amendments which are intended, insofar as possible, to preserve the rights of federally employed seamen under existing law to proceed against the United States apart from the Compensation Act. The purpose is likewise to preserve the status quo as to choice of remedies by seamen.

The first amendment, therefore, proposes to add the following proviso to section 7 (b) of the Federal Em-

ployees' Compensation Act, which subsection would be inserted in that act by section 201 of the bill: "*Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.*"

By this proviso, it is intended that the special provision, as added to the Compensation Act by this bill, declaring the liability of the United States under that act to be exclusive, shall not apply to seamen employed by the United States. It is not intended that the right of federally employed seamen, as heretofore recognized by the courts, to maintain suits against the United States, shall be lessened by this bill. In short, the amendment is intended merely to preserve the status quo as to seamen. If the Congress should decide to go into this matter further at some future session, it could then do so without delaying the enactment of this urgently needed bill.

I propose further that a new section, section 305, be added to the bill on page 39, between lines 17. and 18, as follows:

"SEAMEN

"Sec. 305. (a) Nothing contained in this act shall be construed to affect the exclusion of certain seamen (as defined in the act of March 24, 1943, chapter 26, 57 Stat. 45, as amended; 50 U. S. C. Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such act of March 24, 1943, as amended.

"(b) Nothing contained in this act shall be construed to effect any maritime rights and remedies of a master or member of the crew of any vessel."

Subsection (a) of the proposed section 305 is necessary because of the special status of seamen on vessels that were operated under General Agency agreements with the War Shipping Administration, now succeeded by the Maritime Commission. By the so-called Clarification Act of March 24, 1943, as amended (50 U. S. C. Appendix, Sec. 1291), seamen on vessels so operated are excluded from coverage under the Federal Employees' Compensation Act, and it is not intended to supersede the Clarification Act by these amendments. While the House report on the bill (House Rept. No. 729, p. 13) states that it is not intended to repeal this specific statutory exclusion, doubts have been expressed as to whether the bill and the explanation in the House report would have the intended effect. Consequently, to resolve doubts on this score, subsection (a) of section 305 is proposed, in order to maintain the status quo under the Clarification Act.

Subsection (b) of the proposed new section 305 is intended out of caution, to reaffirm what is accomplished by the proposed amendment to section 201 of the bill, lest some other provision of the bill which, in some way not now foreseen, might be construed to take away any election of remedies that seamen might now have. The new subsection would make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen. The purpose is to reserve to seamen whatever rights they now have, or may be held to have, under maritime law, and to allay the fears that have been expressed that the amendments to the Compensation Act being made by this bill

will be construed to negate or reduce any of the maritime rights and remedies of seamen.

2. It will be observed that section 303 (g) of the bill, on pages 37 and 38, states that the exclusive remedy under the Compensation Act, as provided in the amendment made by section 201 of the bill, shall not apply to cases of injury or death in which liability under laws other than the Compensation Act was "finally determined" prior to the enactment of the present bill. The effect of this provision is to substitute the remedies provided in the Compensation Act for remedies being pursued by Federal employees in a large number of civil and admiralty actions. Thus rights, if any, presently existing and being asserted in pending court proceedings would be wiped out, automatically. It appears to me that such retroactive effect is not desirable or equitable. Claimants merit better treatment from their Government.

The amendment I propose, as a substitute for section 303 (g) of the bill, reads as follows:

"(g) The amendment made by section 201 of this act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such act exclusive except as to masters and members of the crew of any vessels, shall apply to any case of injury or death occurring prior to the date of enactment of this act: *Provided, however,* That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within 6 months after such date before final

judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after enactment of this act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after final determination of such cause, whichever is later, be entitled to file a claim under such act."

The effect of this amendment would be to give Federal employees, for a limited period, a right to elect, in certain situations, whether to pursue their remedies (if they have any) sought in pending cases or to come under the terms of the Compensation Act. Thus, the exclusive remedy provision of section 201 would not automatically apply with respect to an injury or death occurring prior to the date of enactment of this bill if a civil action or an action in admiralty had been commenced with respect thereto prior to the date of enactment of this bill. Persons maintaining such actions could discontinue them within 6 months, before final judgment, and be entitled to file a claim for compensation within the time limits provided in the Federal Employees' Compensation Act, as amended, or within 1 year after the enactment of

this bill, whichever is later. Moreover, in recognition of the fact that some legal actions might be decided adversely to the claimant on grounds other than the merits of the claim, it is provided that persons whose pending claims are dismissed on jurisdictional grounds, insufficiency of the pleadings, or because the remedy under the Compensation Act is exclusive, may file claim under the Compensation Act within similar time limitations.

STATEMENT BY SENATOR DOUGLAS

Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon. The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.

Rather than make a summary disposition of these seamen's rights at this time, or to delay for additional hearings the whole measure affecting compensation rights of all Government employees, it seems wiser, as these amendments do, to preserve the status quo as to such rights of seamen. It is my understanding that we do this pending, and without prejudice to, a full consideration by the Congress on the basis of adequate hearings (a) of the alleged merits or demerits of the Compensation Act benefits as compared with traditional and statutory maritime remedies and (b) of the justice or injustice of, or specific circumstances for, permitting these Federal employees to have an election of remedies denied to others.

It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those Government-employed seamen covered by the act. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen have such an election.

In short, until the matter may be more fully considered by Congress, we seek by the amendments merely to make sure that seamen shall lose no existing rights.

The Presiding Officer. The bill is open to further amendment. If there be no further amendment, the question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill H. R. 3191 was read the third time and passed.

Mr. Douglas. Mr. President, I move that the Senate insist upon its amendment, request a conference with the House of Representatives thereon, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. DOUGLAS, Mr. NEELY, Mr. WITHERS, Mr. TAFT, and Mr. DONNELL conferees on the part of the Senate.